

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MICHAEL ANTONIO JORDAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. C08-5462RBL
CR05-5823RBL

ORDER

THIS MATTER comes on before the above-entitled Court upon Defendant's Motion pursuant to 28 U.S.C. §2255. Having considered the entirety of the records and file herein, the Court finds and rules as follows:

I. BACKGROUND

On February 20, 2007 the defendant pleaded guilty pursuant to Fed. R. Crim. P. 11 (c)(1)(C) to kidnapping resulting in death (Count 3). He was sentenced to 228 months in custody on July 24, 2007. He timely filed a Notice of Appeal and on September 24, 2008 the Ninth Circuit affirmed the sentence of the Court.¹ Jordan raises six claims in his motion: (1) multiplicitous indictment; (2) coerced and unknowing guilty plea; (3) errors in the presentence report; (4) sentencing disparity with co-defendants; (5) various mental health issues justifying a downward departure; and (6) ineffective assistance of counsel.

¹Even though Jordan filed his §2255 motion prior to the Ninth Circuit's disposition of his appeal, this Court now has jurisdiction over the motion due to the subsequent judgment affirming the sentence.

1 Aside from his challenge to the indictment as multiplicitous alleged in Ground One and the sentencing
2 disparity among co-defendants alleged in Ground Four, his claims are more properly considered as
3 allegations of ineffective assistance of counsel and will be analyzed under the standards set forth in
4 *Strickland v. Washington* and its progeny.

5 **II. FACTS AND PROCEDURE**

6 On August 30, 2005 the defendant set in motion the events that would lead to the senseless death
7 of Christopher Jerry. Jerry was killed because he owed Jordan \$1,500 and because of Jerry's relationship
8 with a fifteen-year-old female relative of Thomas Dunigan. The defendant's role in the murder of
9 Christopher Jerry and subsequent attempts to cover it up are set out in great detail in his plea agreement.
10 The Court will briefly summarize them here.

11 During the night of August 30-31, 2005, Michael Jordan, Jacob Gardner and a juvenile (Raymond
12 Robinson) tricked Christopher Jerry into driving them in Jerry's Ford Explorer to Fox Island, Washington.
13 Once there, Jerry was punched and kicked by the three men and tied up with green cord produced by
14 Jordan. Jordan stole Jerry's ATM card, forced Jerry to give him the PIN, and later attempted twice to
15 access the account. They placed the tied up Jerry in the back of the Explorer, covered him with bags of
16 clothes, and drove back to Tacoma, Washington.

17 On the drive to Tacoma, the assailants decided they would take Jerry to Thomas Dunigan's
18 residence in the Tillicum section of Lakewood. Upon their arrival, Dunigan entered the Explorer and
19 punched Jerry several times. Dunigan also placed an assault rifle in the Explorer. Markus Moore arrived
20 at Dunigan's residence in a separate vehicle. Dunigan got in Moore's car and directed Jordan and the
21 others to follow in the Explorer with Jerry still tied up inside.

22 Dunigan led the others to the ASP crash gate at Fort Lewis. After they arrived, Dunigan retrieved
23 the assault rifle from the Explorer and while attempting to chamber a round, jammed the weapon. When
24 the rear of the Explorer was opened, Jerry, who had freed himself from his restraints, ran. Jordan chased
25 him, caught him, and tackled him to the ground near a fence. With Jordan on top of Jerry, Markus Moore
26 approached with a revolver in hand, and told Jordan to get out of the way. Jordan replied "I got this" or
27 words to that effect while still holding Jerry. While Jerry was still on the ground, Moore fired about five
28 shots at Jerry, killing him. Gardner pulled Jordan away as Moore was shooting Jerry. They left Jerry

1 where he lay and fled the scene.

2 After stealing several items from Jerry's Explorer (including the in-dash stereo), Gardner and
3 Jordan abandoned it in North Tacoma. Gardner later burned a duffel bag taken from the Explorer together
4 with Jordan's bloody clothes that had been hidden at the home of Apryl Beach (Jordan's girlfriend). The
5 stolen car stereo was found in the trunk of Jordan's car during a search subsequent to Jordan's arrest, and
6 his key ring with a lanyard made of green cord similar to that used to tie up Jerry was previously recovered
7 from Jordan by Army CID.

8 After his arrest and immediately prior to his initial appearance on the Complaint filed in this matter,
9 Jordan underwent a proffer session with the government in the presence of his attorney, Charles Johnston.
10 At that session, Jordan admitted or confirmed most of the above facts. At a subsequent proffer about a
11 year later, Jordan initially told a different story implicating an unknown shooter and exonerating Moore.
12 However, later in that same session, Jordan admitted his "new" story was false and indicated that the
13 "new" story was Dunigan's idea.

14 Jordan was ultimately charged in seven counts of an eight count Fourth Superseding Indictment
15 with: Conspiracy to Kidnap (Count 1); Conspiracy to Murder (Count 2); Kidnapping Resulting in Death
16 (Count 3); First Degree Murder (Count 4); First Degree Murder-Felony Murder (Count 5); and Possession
17 of a Firearm During and in Relation to a Crime of Violence (Counts 6 and 7). Based upon his guilty plea
18 to Count 3, the remaining counts were dismissed at sentencing.

19 **III. DISCUSSION**

20 **A. By His Guilty Plea, Jordan Waived His Challenge That the Indictment Contained** 21 **Multiplicitous Counts.**

22 A claim that the indictment is flawed, e.g., was multiplicitous, must be raised prior to trial, or in this
23 case, prior to a guilty plea. Fed. R. Crim. P. 12(b)(3)(B). It must be so raised or it is waived. *United*
24 *States v. Klinger*, 128 F.3d 705, 708 (9th Cir. 1997). Furthermore, any claim that the indictment was
25 multiplicitous is rendered moot by the simple fact that the defendant pleaded guilty and was sentenced on
26 only one count. *See United States v. Lewis*, 716 F.2d 16, 23 (D.C. Cir. 1983). And, finally, Jordan
27 explicitly waived "all objections to the form of the charging document[]" in paragraph one of his plea
28 agreement.

1 **B. Ineffective Assistance of Counsel Claims.**

2 **1. Standard.**

3 The defendant's claim that his conviction and sentence must be vacated because he received
4 ineffective assistance of counsel is evaluated under the standard articulated by the Supreme Court in
5 *Strickland v. Washington*, 466 U.S. 668 (1984). To establish constitutionally ineffective assistance of
6 counsel under *Strickland*, the defendant must show that (1) "counsel's performance was deficient," and (2)
7 counsel's "deficient performance prejudiced the defense." *Id.*, at 687. To show that counsel's performance
8 was deficient, defendant must show that "counsel's representation fell below an objective standard of
9 reasonableness." *Id.*, at 688. This Court's "scrutiny of counsel's performance must be highly
10 deferential[]" and the Court "must indulge a strong presumption that counsel's conduct falls within the
11 wide range of reasonable professional assistance." *Id.*, at 689. In the context of a counseled plea of guilty,
12 *Strickland's* second prong of "prejudice" is satisfied only if the defendant can show "that there is a
13 reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have
14 insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

15 **2. Jordan's Guilty Plea Was Not Unknowing or Coerced.**

16 Jordan claims that his guilty plea was unknowing and coerced because the Indictment was
17 multiplicitous and because he was "threatened" by both his own attorney and the government with life
18 imprisonment.

19 The indictment was not multiplicitous. "An indictment is multiplicitous if it charges a single offense
20 in several counts." *United States v. Rude*, 88 F.3d 1538, 1546 (9th Cir. 1996), *cert denied*, 519 U.S. 1058
21 (1997). "The test for multiplicity . . . is whether each separately violated statutory provision 'requires
22 proof of an additional fact which the other does not.'" *United States v. McKittrich*, 142 F.3d 1170, 1176
23 (9th Cir. 1998) (*quoting Blockburger v. United States*, 284 U.S. 299, 304 (1932)), *cert denied*, 525 U.S.
24 1072 (1999). Here all charges in the indictment required proof of at least one additional fact which the
25 others did not.

26 This Court is entitled to give substantial weight to the defendant's answers in open court, under
27 oath, to the questions asked of him during the plea colloquy. *United States v. Mims*, 928 F.2d 310, 313
28 (9th Cir. 1991). The transcript of the defendant's plea demonstrates that his plea was knowingly and

1 intelligently entered and was not the result of threats or coercion. When asked if he was satisfied with his
2 attorney's services, he answered "Yes, sir." When asked if anybody had threatened he or his family in
3 order to coerce him to enter this plea, he answered "I've agreed on my own free will." And, after the facts
4 section of the plea agreement was read to him verbatim, he was asked if it was an accurate statement, and
5 if he participated in the crime of his own free will. He answered affirmatively to both questions.

6 The fact that the government and defense counsel stated the reality of the potential mandatory life
7 sentence if convicted on the murder, felony murder or kidnapping resulting in death charges does not
8 equate to threats or coercion. If his counsel had not so advised him, counsel's performance would have
9 been deficient.

10 Jordan entered his plea knowingly and intelligently. He was not threatened or coerced, and he
11 received the effective assistance of counsel. This claim fails.

12 **3. Jordan's Objections to the Presentence Report Are Waived.**

13 Jordan argues that there were inaccuracies in the facts as set forth in the presentence report.
14 Courts "have consistently held that a §2255 petitioner cannot challenge non-constitutional sentencing
15 errors if such errors were not challenged in an earlier proceeding." *United States v. McMullen*, 98 F.3d
16 1115, 1117 (9th Cir. 1996). The defendant thus waived his right to attack the presentence report in a
17 §2255 motion because he did not attack the presentence report at sentencing or on direct appeal.² *United*
18 *States v. Donn*, 661 F.2d 820, 824 (9th Cir. 1982); *United States v. Schlessinger*, 49 F.3d 683, 685 (9th Cir.
19 1994).

20 He may only raise this issue for the first time by way of a §2255 motion if he can show both cause
21 for the failure to make the objection earlier and prejudice therefrom. *Evenstad v. United States*, 978 F.2d
22 1154, 1158 (9th Cir. 1992). If defendant can establish that he received the ineffective assistance of counsel,
23 he will ordinarily have shown cause and prejudice. *United States v. De la Fuente*, 8 F.3d 1333, 1337 (9th
24 Cir. 1993).

27 ²A review of the record indicates that Jordan was asked at sentencing if he understood what was in the presentence report
28 and he answered affirmatively. He raised no objections to the facts contained in the presentence report. Counsel filed an *Anders*
brief on appeal and did not raise the alleged inaccuracies in the presentence report as a possible issue. Jordan was given the
opportunity to file a supplemental pro se brief on appeal and chose not to file his own brief raising the issue.

1 Notwithstanding that most of the facts in the presentence report came directly from the Statement
2 of Facts contained in the Plea Agreement and specifically adopted by the defendant, the variances could not
3 have affected this Court's sentencing decision. Counsel's failure to object to some discrepancies in the
4 facts was not deficient and did not prejudice the defendant. *See also* §5.B. This claim fails.

5 **4. Defendant's Mental Health Was Before the Court.**

6 Jordan claims that his counsel should have argued that Jordan deserved a lesser sentence due to
7 extreme childhood abuse, PTSD, and the loss of his wife after returning from Iraq. The Court had before it
8 the psychological evaluation of Allen Traywick, Ph.D. which outlined Jordan's mental health issues. The
9 report was discussed at Jordan's sentencing hearing. The fact that the defendant is depressed about his
10 situation and the sentence he received does not warrant relief. Counsel presented Jordan's mental health to
11 the Court. His performance was not deficient. This claim fails.

12 **5. Jordan Received the Effective Assistance of Counsel.**

13 The defendant alleges that his counsel was not prepared to go to trial thus leaving him no choice
14 but to plead guilty. He also alleges that counsel was unprepared and ineffective at sentencing. Jordan is
15 wrong on both counts.

16 In the face of overwhelming evidence of guilt including physical evidence, the defendant's own
17 statements to the government implicating himself in the murder of Christopher Jerry, and the testimony of
18 co-defendants Jacob Gardner and Apryl Beach, Jordan's counsel successfully negotiated a plea to a binding
19 Fed. R. Crim. P. 11 (c)(1)(C) range of sixteen to twenty-two years. By this binding plea agreement,
20 counsel was able to convince the government that the defendant should not be sentenced to mandatory life
21 imprisonment. At sentencing counsel successfully argued for a sentence of nineteen years (228 months)
22 when the Probation Department recommended twenty-two years and the government advocated for
23 twenty-one years. Despite the fact that co-defendant Thomas Dunigan received a twenty year sentence
24 and the Court, on the record, stated that Jordan and Dunigan were equally culpable, counsel's eloquent and
25 impassioned argument resulted in Jordan's lower sentence. The defendant received only nineteen years
26 because counsel outlined the defendant's less than ideal upbringing, mental health issues, and military
27 service to the country in Iraq. He then used those facts to demonstrate that the defendant was deserving of
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1 a lesser sentence than his equally culpable co-defendant, Thomas Dunigan.³

2 Defense counsel, Charles Johnston's representation of Jordan was exemplary. The defendant did
3 not receive the ineffective assistance of counsel, he received extraordinarily effective assistance. This claim
4 fails.

5 **C. The Sentences of Jordan, Gardner, and Robinson Were Not Unfairly Disparate.**

6 Jordan claims that the sentence he received as opposed to the sentences of Jacob Gardner and
7 Raymond Robinson were disparate and based on age and race discrimination. Jacob Gardner, a white male
8 approximately the same age as Jordan received a ten-year sentence based on his early and very substantial
9 cooperation. Raymond Robinson, an African-American juvenile was sentenced to five years. He
10 cooperated by twice wearing a body wire inside the Pierce County Jail. His cooperation was crucial to the
11 conviction of the shooter, Markus Moore. Robinson, who was a juvenile at the time of the crime, was
12 convicted and sentenced in state court. The sentences were not disparate nor were they based on
13 discrimination.

14 **IV. CONCLUSION**

15 Jordan's indictment was not multiplicitous nor was his sentence disparate. He was not subjected to
16 the ineffective assistance of counsel, rather he was the beneficiary of exemplary representation.

17 ³At sentencing the Court stated:

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19 It is possible from the circumstances of this case to say that everybody and
20 everything that was done that night was a tool in your hands. I came out here thinking that,
21 looking at this offense in particular, which I think is by far the overriding factor in what
dictates a reasonable sentence, that your participation was not one iota less culpable than Mr.
Dunigan's, who I think was the leader and mastermind of the last few moments of Mr. Jerry's
life. You turned that over to him, but you continued to participate.

22 * * *

23 So I came out here having concluded in my own mind that the same sentence that
Mr. Dunigan got was what you should get.

24 Mr. Johnston has argued passionately that there are critical difference between you
25 and Mr. Dunigan, not with regard to this offense, in my judgment, but with regard to your
former life. That you have served in the military; that you have been relatively law abiding;
26 that you have suffered from mental disabilities that have or may have contributed to decisions
that you have made, including on this evening. I'm not wholly convinced by the
government's argument that when it comes to criminal history and former life that it's not
worth something.

27 It is for that reason that I am going to impose a sentence of 228 months and not the
28 240 months that I imposed upon Mr. Dunigan. But I want to make it clear that as far as I'm
concerned that you are as culpable as Mr. Dunigan.

1 Defendant's Motion pursuant to 28 U.S.C. §2255 is therefore **DENIED**.

2 The Court declines to issue a certificate of appealability because the defendant has failed to make "a
3 substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2).

4 **IT IS SO ORDERED.**

5 Dated this 31st day of December, 2008.

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8 RONALD B. LEIGHTON
9 UNITED STATES DISTRICT JUDGE
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